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2
3 UNITED STATES DISTRICT COURT
4 WESTERN DISTRICT OF WASHINGTON
5 AT SEATTLE

6 WEDI CORP.,

7 Plaintiff,

8 v.

9 SEATTLE GLASS BLOCK
WINDOW, INC.,

10 Defendant.

C18-636 TSZ

ORDER

11 THIS MATTER comes before the Court on defendant Seattle Glass Block
12 Window, Inc.'s motion for summary judgment, docket no. 58. Having reviewed all
13 papers filed and referenced in support of, and in opposition to, the motion, the Court
14 enters the following order.

15 **Background**

16 **A. The Parties and their "Agreement"**

17 Plaintiff wedi Corp. ("wedi") manufactures and distributes a composite board
18 product used for the construction of waterproof shower systems or other walls on which
19 tile or stone is affixed. *See* Compl. at ¶ 7 (docket no. 42). In June 2008, defendant
20 Seattle Glass Block Window, Inc. ("Seattle Glass") signed an Agency Agreement that
21 would have appointed Seattle Glass to be wedi's "exclusive agent" to solicit orders for
22 wedi's products in eight states, namely Alaska, Hawaii, Idaho, Montana, Oregon, Texas,
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1 Washington, and Wyoming. Ex. 1 to Compl. (docket no. 42). wedi, however, did not
2 sign the Agency Agreement, and neither party initialed the separate arbitration provision
3 contained in the document. *Id.* Thus, the Agency Agreement (and its arbitration clause)
4 never became a binding contract between wedi and Seattle Glass.

5 On June 1, 2008, wedi executed a different Agency Agreement, between itself and
6 Brian Wright (“Wright”), who owns Seattle Glass, having purchased it from his father in
7 1988. *See* Wright Decl. at ¶¶ 2 & 3 and Ex. 1 (docket nos. 20 & 20-1). The fully signed
8 agreement between wedi and Wright (the “2008 Wright Agreement”) appointed Wright
9 as wedi’s Regional Sales Manager to solicit orders for products and coordinate sales
10 representatives in 14 states, *i.e.*, Alaska, Arizona, California, Colorado, Hawaii, Idaho,
11 Montana, Nevada, New Mexico, Oregon, Texas, Utah, Washington, and Wyoming.
12 Ex. 1 to Wright Decl. (docket no. 20-1). In late 2012, wedi and Wright negotiated and
13 executed a revised Agency Agreement that had an effective date of January 1, 2013,
14 (the “2013 Wright Agreement”), pursuant to which Wright “under Sound Products Sales
15 LLC” was designated wedi’s “exclusive agent” for four states and one Canadian
16 province, namely Hawaii, Idaho, Oregon, Washington, and British Columbia. Ex. 2 to
17 Wright Decl. (docket no. 20-2). The 2013 Wright Agreement was terminated effective
18 September 1, 2014, and wedi ended any distributor relationship with Seattle Glass as of
19 September 30, 2014. *See* Compl. at ¶ 54 (docket no. 42).

20 **B. Other Litigation Involving wedi and Wright**

21 Wright owns Sound Product Sales L.L.C. (“Sound Product”) and Hydro-Blok
22 USA LLC (“Hydro-Blok”), both of which are limited liability companies in which
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1 Wright is the sole member. See Corp. Disclosure Stmts. (C15-671, docket nos. 13 & 14).
2 Hydroblok International Ltd. (“H-International”) is a company organized under the laws
3 of Canada, the sole proprietor of which is Ken Koch. Corp. Disclosure Stmt. (C15-615,
4 docket no. 3). In a related action before this Court, namely Case No. C15-671 (into
5 which Case No. C15-615 has been consolidated), wedi brought claims against Wright,
6 Sound Product, Hydro-Blok and H-International, some of which were resolved in an
7 arbitral award that has been confirmed by the Court, see Order (C15-671, docket
8 no. 128); Arbitral Award (C15-671, docket no. 101-3), and some of which were
9 dismissed on the basis of collateral estoppel, see Order (C15-671, docket no. 152);
10 Minute Order at ¶ 2 (C15-671, docket no. 160).¹ The question now before the Court is
11 whether any of wedi’s claims against Seattle Glass are also barred on res judicata and/or
12 collateral estoppel grounds by the decisions issued by the arbitrator and/or the Court in
13 the related matter, Case No. C15-671.

14 The parties to the arbitration that was compelled in Case No. C15-671 were wedi,
15 Wright, and Sound Product. In the arbitration, wedi alleged, in substance, as follows:

16 [B]eginning in or about 2010, Wright breached contractual and fiduciary
17 duties to wedi by engaging in discussions with other individuals to develop
18 a new product that would compete against wedi; Wright wrongfully
19 disclosed information that wedi considers “confidential” within the
language of the contracts Wright signed, and also considers to be trade
secrets under Washington state law; and, in anticipation of going into
competition against wedi, Wright stopped using his best efforts to promote

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21 ¹ In C15-671, wedi has five claims remaining, namely (i) tortious interference with contract against
22 H-International, (ii)-(iv) violation of the Lanham Act, violation of Washington’s Consumer Protection
23 Act, and tortious interference with prospective advantage against Wright, Hydro-Blok, and
H-International, and (v) abuse of process against Wright, Sound Product, and Hydro-Blok. Also still
pending in C15-671 are claims by Wright, Sound Product, and Hydro-Blok against wedi for tortious
interference with prospective advantage and abuse of process. See Order (C15-671, docket no. 152).

1 wedi in the Pacific Northwest, deliberately bypassing the opportunity to sell
2 wedi's product through one or more prominent regional distributors.

3 Arbitral Award at 3 (docket no. 101-3). In the arbitration proceedings, wedi demanded
4 inter alia that Wright and Sound Product be required to return approximately \$870,000
5 in commissions paid by wedi during the period when Wright was allegedly in breach of
6 his contractual and fiduciary duties. Id. at 4. The arbitrator found in favor of Wright and
7 Sound Product, and against wedi, on all but one claim, namely the breach of contract
8 claim, as to which the arbitrator awarded only nominal damages.

9 The breach of contract claim on which wedi prevailed was based, in part, on
10 Wright's admission that he improperly disclosed a few of wedi's confidential documents,
11 and as to this violation of the parties' agreement, the arbitrator awarded wedi \$1.00. Id.
12 at 13-14. The arbitrator, however, rejected wedi's theory that Wright's alleged breach
13 of contract, breach of fiduciary duty, and/or misappropriation of trade secrets caused
14 damages (e.g., lost profits), finding explicitly: (i) Wright "credibly explained valid
15 business reasons for not pursuing the accounts" that wedi asserted he should have
16 secured; (ii) the evidence did not support a conclusion that Wright either failed to use
17 "best efforts" in representing wedi or "did not do everything within his reasonable
18 business judgment to maximize his commissions" while representing wedi; (iii) wedi
19 provided no proof that it was damaged by Wright's disclosure of a few of its confidential
20 documents, which Wright's expert's unchallenged report indicated would have conferred
21 no valuable competitive advantage and which the arbitrator ruled were not protectable
22 trade secrets; and (iv) any lost sales were self-inflicted, having been caused by wedi's
23 own decision to pull its product from distributors carrying the competing Hydroblok line.

1 Id. at 10-12 & 15. The arbitrator also denied wedi’s request for return of commissions,
2 reasoning that neither Wright nor Sound Product had engaged in conduct “so egregious
3 to warrant forfeiture of commissions earned.” Id. at 15. The arbitrator further observed
4 that, if wedi was permitted to recoup the commissions it had paid, wedi would be unjustly
5 enriched because those commissions were paid on actual sales on which wedi had
6 profited as a result of Wright’s efforts. Id.

7 **C. The Dispute Between wedi and Seattle Glass**

8 In this case,² wedi pleads the following claims against Seattle Glass: (i) breach
9 of contract; (ii) breach of fiduciary duty; (iii) fraud; (iv) violation of the Illinois Trade
10 Secrets Act, 765 ILL. COMP. STAT. 1065/1–9; and/or (v) alternatively, violation of
11 Washington’s Uniform Trade Secrets Act, RCW Chapter 19.108. In the operative
12 pleading, all of the acts alleged to have been committed by Seattle Glass are attributed
13 to Wright. For example, wedi claims that Seattle Glass “through Wright” began
14 collaborating, “as early as February 2011,” with Ken Koch and H-International to
15 “develop products in direct competition with wedi’s products.” Compl. at ¶ 18 (docket
16 no. 42). wedi further alleges that “Wright and Koch began collaborating with Werner
17 Hammelmann . . . , the European sales manager for Marmox, a foam board product line
18 manufactured in Egypt, to develop products for the U.S. market in competition with
19 wedi.” Id. at ¶ 24.

22 ² wedi commenced this action in September 2017 in the Northern District of Illinois. By Memorandum
23 Opinion and Order entered April 16, 2018, docket no. 39, Seattle Glass’s motion to transfer the case to
this district was granted.

1 In addition, wedi pleads that “Wright, on behalf of himself and SGB [Seattle
2 Glass], began disclosing wedi’s internal documents and assisting wedi’s competitors in
3 their competitive efforts.” *Id.* at 26. wedi also accuses Seattle Glass of fraudulently
4 concealing material information from wedi regarding its and Wright’s “intentions and
5 activities in developing products in competition with wedi,” and theorizes that such
6 fraudulent concealment “was intended to and did induce wedi to enter into a new Agency
7 Agreement with Wright and . . . Sound Product . . . , effective January 1, 2013.” *Id.* at
8 ¶¶ 52-53. Seattle Glass contends that, in levying these various claims, wedi is improperly
9 attempting to re-litigate matters that either were or should have been asserted and decided
10 in arbitration.

11 **Discussion**

12 **A. Claim and Issue Preclusion**

13 Res judicata generally refers to the preclusive effect of former litigation. *Robi v.*
14 *Five Platters, Inc.*, 838 F.2d 318, 321 (9th Cir. 1988); *Paine v. Griffin (In re Paine)*, 283
15 B.R. 33, 38 (B.A.P. 9th Cir. 2002). Res judicata has two conceptual categories: (i) claim
16 preclusion; and (ii) issue preclusion, often called “collateral estoppel.” *Robi*, 838 F.2d at
17 321 & n.2; *Paine*, 283 B.R. at 38; *see also Frank v. United Airlines, Inc.*, 216 F.3d 845,
18 850 n.4 (9th Cir. 2000) (“Rather than using the terms ‘res judicata’ and ‘collateral
19 estoppel,’ the Supreme Court has generally used the terms ‘claim preclusion’ and ‘issue
20 preclusion.’”); *Ross v. Alaska*, 189 F.3d 1107, 1110 n.2 (9th Cir. 1999). The key
21 distinction between the two types of preclusion is that matters never litigated may be
22 barred by claim preclusion, while only matters actually litigated may be barred by issue
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preclusion. *See Frank*, 216 F.3d at 850 n.4; *Ross*, 189 F.3d at 1110 n.2. In addition, although claim preclusion requires that the parties to the previous and current proceedings be identical or in privity, *see Robi*, 838 F.2d at 321; *see also Frank*, 216 F.3d at 850, issue preclusion does not demand a similar showing. Rather, issue preclusion is appropriate when (i) the previous and current proceedings involve the same issue; (ii) the issue was actually litigated and determined; (iii) the prior decision is valid and final; and (iv) the determination of the issue was essential to the prior decision. Restatement (Second) of Judgments § 27 (Am. Law. Inst. 1982); *see Robi*, 838 F.2d at 322; *Paine*, 283 B.R. at 39.

B. Alleged Waiver of Preclusion Defenses

In response to Seattle Glass’s motion for summary judgment, wedi contends that Seattle Glass waived its res judicata and collateral estoppel defenses. wedi’s argument lacks merits. Claim and issue preclusion are defenses that may be deemed waived if not raised in the pleadings or if the party attempting to invoke the defenses failed to timely object to the prosecution of dual proceedings. *See Clements v. Airport Auth. of Washoe Cnty.*, 69 F.3d 321, 328-29 (9th Cir. 1995). The Court, however, may “overlook” any waiver, and *sua sponte* raise res judicata and/or collateral estoppel when appropriate to vindicate private and/or public interests, including shielding a particular party from the burden of re-litigating identical issues, safeguarding a private entity’s right to “repose,” avoiding inconsistent results, and preserving judicial economy. *Id.* at 329-30.

wedi does not accuse Seattle Glass of failing to plead res judicata and collateral estoppel as affirmative defenses. Indeed, claim and issue preclusion are asserted as the

1 first of several defenses in Seattle Glass’s Answer, docket no. 46. Rather, wedi asserts
2 that Seattle Glass waived its rights by (i) not objecting to wedi’s maintenance of two
3 separate arbitration proceedings, one conducted in Chicago, Illinois against Wright and
4 Sound Product (the “Wright Arbitration”) and the other commenced in Atlanta, Georgia
5 against Seattle Glass (the “Atlanta Arbitration”), (ii) not raising the preclusion defenses
6 in the Atlanta Arbitration, and/or (iii) not asserting the preclusion defenses in the Wright
7 Arbitration.

8 In accusing Seattle Glass of not objecting to the prosecution of dual proceedings,
9 wedi simply ignores the record. As acknowledged by wedi’s own attorney, Seattle Glass
10 challenged the arbitrability of wedi’s claims against it because wedi never signed the
11 Agency Agreement and neither party initialed the arbitration clause in the agreement.
12 See Becka Decl. at ¶ 8 (docket no. 64). The Atlanta Arbitration was stayed pending
13 completion of the Wright Arbitration, id., and before the question of arbitrability could
14 be resolved by an arbitrator, who had not yet been selected, wedi withdrew its claims in
15 the Atlanta Arbitration and initiated this litigation, id. at ¶ 14. Thus, contrary to wedi’s
16 suggestion, Seattle Glass never had an opportunity in the Atlanta Arbitration to be heard
17 concerning the preclusive effect of the Wright Arbitration, and Seattle Glass cannot be
18 viewed as having acquiesced in wedi’s pursuit of either the Atlanta Arbitration or this
19 lawsuit.

20 With regard to the Wright Arbitration, wedi fails to explain how Seattle Glass
21 could have asserted res judicata or collateral estoppel in a proceeding to which it was not
22 a party. wedi also fails to explain how Seattle Glass could have asserted, before the
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1 arbitrator even issued his award in June 2017 in the Wright Arbitration, that the Wright
2 Arbitration had preclusive effect with respect to the claims alleged in the Atlanta
3 Arbitration, which was initiated in February 2017. *See id.* at ¶¶ 7 & 12. Finally, to the
4 extent that wedi contends it was entitled to notice from Seattle Glass concerning the
5 potentially preclusive effect of wedi's decision not to assert claims against Seattle Glass
6 in the Wright Arbitration, wedi cites no authority for the proposition that an opposing
7 party must provide legal advice about the consequences of one's own litigation choices
8 and/or strategy. The Court concludes that Seattle Glass has not waived the defenses of
9 res judicata and collateral estoppel. Moreover, even if any waiver had occurred, the
10 Court would "overlook" it and conclude that considering the res judicata and collateral
11 estoppel issues raised by Seattle Glass serves the purposes of shielding Wright and
12 Seattle Glass from the burden of re-litigating issues decided in the Wright Arbitration and
13 of preserving judicial economy. *See Clements*, 69 F.3d at 329-30.

14 **C. Binding Effect of Wright Arbitration**

15 **1. Breach of Contract, Breach of Fiduciary Duty, and**
16 **Misappropriation of Trade Secrets**

17 Regardless of whether labeled res judicata or collateral estoppel, the preclusive
18 effect of the Wright Arbitration is as follows. In the Wright Arbitration, wedi attempted,
19 but failed, to establish that Wright intentionally sacrificed income as wedi's Regional
20 Sales Manager or exclusive agent in the hope that he would make up the difference later
21 after the Hydroblok line went on the market. Arbitral Award at 11 (docket no. 101-3). In
22 addition, wedi endeavored, but was unable, to persuade the arbitrator that, in the absence
23 of a prior disclosure to wedi, Wright was prohibited by the 2008 and/or 2013 Agency

1 Agreement from having discussions with Ken Koch and others about future plans to
2 compete with wedi. *Id.* at 14. The arbitrator reasoned that Wright and Sound Product
3 “could lawfully consider the opportunity to represent” H-International before terminating
4 their relationships with wedi, and such activity did not constitute a breach of contract. *Id.*
5 Moreover, wedi tried to, but did not, prove that the confidential information disclosed by
6 Wright provided an unfair head start and/or competitive advantage to the developers of
7 the Hydroblok product. *Id.* at 11-12. Finally, wedi failed to establish the existence of
8 any protectable trade secrets shared with or allegedly misappropriated by Wright. *Id.* at
9 15.

10 In sum, with the exception of Wright’s confessed disclosure of a few confidential
11 documents, wedi did not, in the earlier arbitration, substantiate its accusations against
12 Wright, and wedi is not entitled to try again in this litigation under the guise of suing a
13 different entity. The arbitrator’s finding that Wright’s conduct either did not breach a
14 contractual, fiduciary, or statutory duty or was not causally linked to any injury or
15 damages suffered by wedi has preclusive effect regardless of whether Wright is alleged to
16 have taken his actions on behalf of Sound Product, Hydro-Blok, or Seattle Glass. The
17 Court therefore concludes that the confirmed award in the Wright Arbitration precludes
18 wedi’s breach of contract, breach of fiduciary duty, and misappropriation of trade secrets
19 claims against Seattle Glass in this case.

20 **2. Fraud**

21 The Court defers ruling, however, on whether wedi’s claim of fraud is likewise
22 barred on res judicata and/or collateral estoppel grounds. In pleading fraud, wedi alleges
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1 that Seattle Glass made material misrepresentations and/or omissions during the course of
2 negotiations culminating in the 2013 Wright Agreement. Compl. at ¶¶ 88-89 (docket
3 no. 42). The misrepresentations and/or omissions at issue appear to be the same actions
4 that formed the basis of the breach of contract and breach of fiduciary duty claims wedi
5 asserted in the Wright Arbitration, namely engaging in discussions about the prospect of
6 selling the Hydroblok line of products without disclosing such talks to wedi.³ Although
7 the underlying facts are the same, a different legal theory is raised in this litigation than in
8 the earlier proceeding. Unlike in the Wright Arbitration, in this action, wedi asserts, in
9 essence, that it was fraudulently induced by Seattle Glass's material misrepresentations
10 and/or omissions into entering into the 2013 Wright Agreement, that the 2013 Wright
11 Agreement is therefore voidable, and that the commissions paid pursuant to the 2013
12 Wright Agreement, which total more than \$600,000, were not owed by wedi and should
13 be returned by Seattle Glass. See id. at ¶¶ 88-90.

14 The Court is inclined to dismiss wedi's fraud claim against Seattle Glass, not on
15 res judicata or collateral estoppel grounds, but on the merits. Seattle Glass was not a
16 party to the 2013 Wright Agreement. Thus, why commissions would have been paid to
17 Seattle Glass under such contract and how Seattle Glass would be liable even if the 2013
18 Wright Agreement were voidable on the basis of fraudulent inducement are mysteries.
19 Because the parties did not discuss the merits of wedi's fraud claim in their briefing, the
20 Court will permit (i) wedi to file, on or before November 26, 2018, a supplemental

22 ³ Seattle Glass has not challenged wedi's fraud claim on the ground that it is not pleaded with sufficient
23 particularity, see Fed. R. Civ. P. 9(b), and the Court declines to further address the issue.

1 response not to exceed eight (8) pages in length, and (ii) Seattle Glass to file, on or before
2 November 30, 2018, a supplemental reply not to exceed five (5) pages in length. If the
3 Court concludes that wedi's fraud claim against Seattle Glass lacks merit (or if wedi
4 voluntarily dismisses the claim), this case will be closed upon entry of judgment in favor
5 of Seattle Glass.

6 **Conclusion**

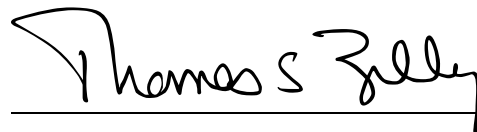
7 For the foregoing reasons, the Court ORDERS:

8 (1) Defendant Seattle Glass Block Window, Inc.'s motion for summary
9 judgment, docket no. 58, is GRANTED in part and DEFERRED in part. Plaintiff wedi
10 Corp.'s claims against Seattle Glass for breach of contract, breach of fiduciary duty,
11 and misappropriation of trade secrets under either Illinois or Washington law are
12 DISMISSED with prejudice on res judicata and/or collateral estoppel grounds. Seattle
13 Glass's motion is otherwise DEFERRED and RENOTED to November 30, 2018,
14 pending further briefing from the parties concerning the merits of wedi's fraud claim.

15 (2) The Clerk is directed to send a copy of this Order to all counsel of record.

16 IT IS SO ORDERED.

17 Dated this 6th day of November, 2018.

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20 Thomas S. Zilly
21 United States District Judge
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